IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

CHARLES W. FERGUSON,

Plaintiff,

v.

Civil Action No. 3:10-CV-00116JPB
(Formerly Civil Action No.: 10-C-107
In the Circuit Court of Mineral County)

JOHN DOE, and
NATIONAL CASUALTY COMPANY,

Defendant.

PLAINTIFF'S MOTION FOR REMAND AND
INCORPORATED MEMORANDUM OF LAW IN SUPPORT

COMES NOW, the Plaintiff, by and through the undersigned counsel, and hereby moves this Honorable Court for the entry of an Order pursuant to 28 U.S.C. § 1447(c) remanding this matter back to the Circuit Court of Mineral County, West Virginia, on the grounds that the Defendant, National Casualty Company ("NCC"), has failed to prove that the amount in controversy exceeds $75,000; therefore, this Court lacks subject matter jurisdiction over the case. In support of his motion, the Plaintiff files his incorporated memorandum of law, *infra*, and states and alleges as follows:

1. On October 20, 2010, the Plaintiff filed his Complaint in the Circuit Court of Mineral County, West Virginia, Civil Case No. 10-C-107, regarding breach of contract, common law bad faith, and violations of West Virginia's Unfair Claims Settlement Practice and statutes, pursuant to West Virginia Code § 33-11-1 *et seq.* and other provisions of West Virginia law, against the Defendant, NCC.

2. On November 24, 2010, NCC filed its Notice of Removal based on diversity of citizenship.

3. For diversity jurisdiction to be available, not only must all adverse parties in the suit be completely diverse with regard to citizenship, but NCC must also prove that there is at least $75,000.01 in controversy, exclusive of interest and costs, at the time the complaint is removed.

4. The Plaintiff asserts, as of the day of filing this Motion for Remand, all known actual incurred compensatory extra contractual damages are less than $75,000.

NCC only asserts as a basis for its Notice of Removal that:

> This is a civil action based on plaintiff Charles W. Ferguson's claims against his insurer for breach of contract, common law bad faith, and violation of unfair claims settlement practice pursuant to W.Va. Code §33-11-1. Plaintiff seeks compensatory damages, punitive and exemplary damages, statutory damages and remedies, fees, costs, and interest. Based upon the claims, the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs, as required by 28 U.S.C. § 1332.

(Refer to Docket No. 3)

Importantly, nowhere in the Plaintiff's Complaint does the Plaintiff allege an amount in controversy exceeding the $75,000 jurisdictional requirement. Regarding this minimum threshold amount in controversy requirement, the Plaintiff stated only that he "suffered multiple injuries, including injury to his shoulder, multiple cuts, bruises and abrasions, and developed post traumatic syndrome to the point where his physician and psychiatrist required him to stop driving . . . and he has, accordingly suffered, and continues to suffer, substantial loss of income." (Compl. ¶¶ 8 and 9.) NCC'S conclusory statement that the jurisdictional amount of this Court has been satisfied is insufficient to confer federal court jurisdiction. NCC has not proffered any evidence to show that the jurisdictional amount of this Court has been satisfied. NCC merely speculates that the damages exceed $75,000.00 because it desires to invoke the jurisdiction of this Court. Such a showing by NCC is insufficient, and as such, this action should be remanded.

5. The Plaintiff has filed his Motion for Remand within thirty (30) days of NCC'S filing of its Notice of Removal. Therefore, this Motion for Remand is timely.

6. The Plaintiff has incurred attorney's fees and costs in conjunction with the filing of this Motion for Remand. If the Plaintiff's Motion for Remand is granted, he respectfully requests that this Court enter an Order requiring NCC to pay "just costs and any actual expenses including attorney's fees incurred as a result of the removal." *See* 28 U.S.C. § 1447(c).

7. For all of the above reasons and for those stated within the following memorandum of law, the Plaintiff's Complaint should be remanded to the Circuit Court of Mineral County, West Virginia.

WHEREFORE, pursuant to 28 U.S.C. § 1447, the Plaintiff, Charles W. Ferguson, respectfully requests that this Honorable Court:

A. Remand this case back to the Circuit Court of Mineral County, West Virginia;

B. Award the Plaintiff's attorney's fees and costs incurred in conjunction with preparing this Motion for Remand and Memorandum of Law in Support; and

C. Grant any other relief this Court deems just and proper.

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR REMAND

I. APPLICABLE FEDERAL STATUTES AND RULE

Federal Statute 28 U.S.C. §1332, entitled, "Diversity of citizenship; amount in controversy; costs," states in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
> (1) citizens of different states;
> (2) citizens of a state and citizens or subjects of a foreign state;
> * * *

28 U.S.C. §1332(a) (2010).

United States Code §1447 (2010) entitled, "Procedure After Removal Generally," provides in pertinent part:

> (c) A motion to remand a case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction of the jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as the result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. §1447(c) (2010).

II. FEDERAL DIVERSITY JURISDICTION

A. Burden

The removing defendant has the burden of proving the existence of federal jurisdiction ("If a plaintiff files suit in state court and the defendant seeks to adjudicate the matter in federal court through removal, it is the defendant who carries the burden of alleging in his notice of removal and, if challenged, demonstrating the court's jurisdiction over the matter." *Strawn v. AT & T Mobility LLC*, 530 F.3d 296 (4th Cir. 2008)). Furthermore, "courts should 'resolve all doubts about the propriety of removal in favor of retained state court jurisdiction.'" *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999) quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir.1993). Accordingly, the district court is required to resolve all doubts about federal jurisdiction in favor of remand. *Hartley*, 187 F.3d at 425.

The court's removal jurisdiction must be strictly construed: "[w]e are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994).

B. Doubt As to Federal Jurisdiction.

Where there is any doubt concerning the jurisdiction of the federal court on removal, the case should be remanded; jurisdiction should be retained only where jurisdiction is clear. *Mulcahey*, 29 F.3d 148. The federal district court must remand to the state court any case that was removed improvidently or without necessary jurisdiction: "'[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.'" *Dixon*, 369 F.3d at 816 quoting *Mulcahey*, 29 F.3d at 151.

III. LEGAL ARGUMENT

28 U.S.C. § 1332 makes it clear that the $75,000.01 jurisdictional amount must be proven before federal jurisdiction can be invoked. Accordingly, where no specific ad damnum amount is stated, the defendant bears the burden of establishing that the plaintiff's damages exceed the jurisdictional amount of $75,000.00. *Mullins v. Harry's Mobile Homes, Inc.*, 861 F.Supp. 22, 23

(S.D. W. Va. 1994). The amount in controversy is determined by "considering the judgment that would be entered if the plaintiff prevailed on the merits of his case at the time of removal." *Sayre v.* Potts, 32 F.Supp. 881, 886 (S.D. W. Va. 1996). The plaintiff is the master of his claim, and "where a plaintiff chooses to bring an action in state court, '[t]here is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court . . . .'" *Knott v. HSBC Card Services Inc.*, 2010 WL 3522105 (N.D. W. Va. 2010) quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290 (1988).

The United States District Court for the Northern District of West Virginia has considered the issue presented here, to which it consistently applies the "preponderance of evidence" standard to determine whether a defendant has met its burden of proving the amount in controversy. *See, e.g.*, *Barberio v. American Family Life Assur. Co. of Columbus*, 2008 WL 4724318 (N.D. W. Va. 2008); *Elliot v. Wal-Mart Stores, Inc.*, 2008 WL 2544650 (N. D. W. Va. 2008); *Keeper v. Gallagher*, 2005 WL 2175134 (N.D. W. Va. 2005). Furthermore, "'the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount.'" *Keeper* 2005 WL 2175134, at *1 quoting *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir.1995), *cert. denied*, 516 U.S. 865, 116 S.Ct. 180, 133 L.Ed.2d 119 (1995). "This burden of proof requires the defendants to produce *evidence* that establishes that the actual amount in controversy exceeds $75,000.00." *Keeper* 2005 WL 2175134, at *1 (emphasis added).

Here, the Defendant has offered no proof or evidence of any kind that the amount in controversy exceeds $75,000 other than the bare assertion that "[b]ased upon the claims, the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs, as required by 28 U.S.C. § 1332," apparently surmised from the Plaintiff's Complaint (Refer to

Docket No. 3) This conclusory statement—that the premise is true merely because it says so—is nothing more than a bare assertion fallacy. While the Plaintiff's Complaint makes a demand for "such compensatory damages as will compensate the Plaintiff for his actual losses including but not limited to attorneys' fees and costs" (*see* Compl., ad damnum), these damages are indeterminate, speculative, or have yet to be incurred and the Defendant's removal "cannot be based on speculation; rather, it must be based on facts *as they exist at the time of removal*." *Barberio*, 2008 WL 4724318, at *2 citing *Varela v. Walmart Stores, East, Inc.*, 86 F.Supp.2d 1109, 112 (D. N.M. 2000) (emphasis added). Moreover, "the mere 'threat' of punitive damages, without more, does not give rise to federal jurisdiction." *Barberio*, 2008 WL 4724318, at *2 quoting *Landmark Corp. v. Apogee Coal Co.*, 945 F.Supp. 932 (S.D. W. Va. 1996).

Similar removal actions to the case at bar have been challenged and remanded by the Northern District Court. For example, in *Knott*, this Court found that the plaintiff could be entitled to approximately $17,500.00, plus attorney's fees and costs. *Knott*, 2010 WL 3522105. This Court remanded the case, finding that the defendant failed to satisfy its burden of proving that the amount in controversy exceeded the jurisdictional amount. In *Walt*, the plaintiff alleged injuries to his neck, shoulder, and back, suing under a number of recovery theories, including permanent injuries, lost earning capacity, lost past and future income, past and future medical bills, pain and suffering, mental and emotional anguish, loss of enjoyment of life, and attorney's fees. *Walt v. Fedex Frieght, Inc.*, 2010 WL 3075197 (N.D. W. Va. 2010). The Northern District Court found that the defendants failed to meet their burden with regard to the amount in controversy because they provided, as in the case *sub judice*, "no evidence as to what those past lost earnings or income are in order for this Court to find those loses and future loses could raise to the amount in controversy." *Id.* at *2. In *Barberio*, the decedent's administratrix brought a breach of contract and a first-party bad faith claim against the decedent's insurer, seeking to recover, as in the instant case, compensatory and punitive damages, attorney's fees, costs, and general relief. *Barberio*, 2008 WL 4724318. The Court remanded the case on the grounds that the defendant's grounds for removal were based on speculation, not facts. *Id.* Finally, in *Seifert*, the plaintiffs sued their insurer, alleging (again, as in this case), breach of contract, common law bad faith, and violation of the West Virginia Unfair Claims Settlement Practices Act. *Seifert v. Nationwide Mutual Insurance Co.*, 2007 WL 1381521 (N.D. W. Va. 2007). The defendant argued that "'the Plaintiffs' claims for 'bad faith' when coupled with the Plaintiffs' alleged compensatory damages, would certainly meet the federal jurisdictional limit" and that the plaintiffs "simply request remand for their convenience [because they had not stipulated that the amount in controversy was less than $75,000.00]." *Id.* at *2. Again, the Court found that the defendant failed to meet its burden; therefore "plaintiffs' motion to remand must be granted." *Id.*

IV. ENTITLEMENT TO ATTORNEYS' FEES AND COSTS

The Plaintiff incurred attorney's fees and costs in conjunction with the preparation of this Motion for Remand and Memorandum of Law in Support. 28 U.S.C. § 1447(c), as amended, provides in relevant part that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred result of the removal." The intent of the statute is to reimburse a party, like the Plaintiff, who has incurred expenses in attacking an insufficient removal.

V. CONCLUSION

In this case, the Defendant offered nothing to meet its evidentiary burden. In its removal paper, the Defendant merely asserts that this case ""[b]ased upon the claims, the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs." (Refer to Docket No. 3) Having failed to carry their evidentiary burden, the Defendant removed this case without any legal basis. Accordingly, the Plaintiff's Motion to Remand should be granted and the Defendant should be ordered to pay the Plaintiff's costs and expenses, including attorney's fees incurred in conjunction with preparing this Motion for Remand.

Respectfully Submitted,

CHARLES W. FERGUSON
PLAINTIFF
BY COUNSEL

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CERTIFICATE OF SERVICE

I, Kelley A. Kuhn, counsel for the Plaintiff, do hereby certify that on December 13, 2010, I electronically filed the foregoing **Plaintiff's Motion for Remand and Incorporated Memorandum of Law in Support** with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following: Lee Murray Hall of Jenkins Fenstermaker, PLLC, Post Office Box 2688, Huntington, WV 25726, counsel for the Defendant NCC.

Kelley A. Kuhn
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